IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.GIRI

FRIDAY, THE 19TH OCTOBER 2007 / 27TH ASWINA 1929

WP(C).No. 13490 of 2006(E)

PETITIONER:

P.J.TOMMY, S/O.P.A.JOSEPH,
PROPRIETOR, INDOJAP SHIPYARD, 28/3433,
MOTHER TERESA NAGAR, ELAMKULAM, KOCHI-682 020.

BY ADV. SRI.A.M.SHAFFIQUE
SRI.E.K.NANDAKUMAR
SRI.A.K.JAYASANKAR NAMBIAR

RESPONDENTS:

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1. STATE OF KERALA, REPRESENTED BY
THE CHIEF SECRETARY TO GOVERNMENT,
SECRETARIAT, THIRUVANANTHAPURAM.

2. THE SUPERINTENDING ENGINEER,
SOUTHERN REGION, HARBOUR ENGINEERING DIVISION,
KAMALESWARAM, MANACAUD P.O.,
THIRUVANANTHAPURAM-9.

3. THE EXECUTIVE ENGINEER,
HARBOUR ENGINEERING DIVISION,
MUNAMBOM, ERNAKULAM-683 515.

4. THE TAHSILDAR (RR), KANAYANNUR TALUK,
ERNAKULAM-682 011.

BY GOVERNMENT PLEADER SRI. MATHEW VADAKKEL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 19/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC NO 13490/06

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1. COPY OF THE TENDER DOCUMENTS SUBMITTED ON 3.2.04

EXT.P2. COPY OF THE ORDER NO.D2/3457/03/SE DT. 28.12.04 ISSUED BY THE 2ND RESPONDENT WITH ENCLOSURE THERETO

EXT.P3. COPY OF THE ORDER NO.D2/3457/03/SE DT. 9.3.05 FROM THE 2ND RESPONDENT

EXT.P4. COPY OF THE LETTER RECEIVED BY THE PETITIONER ON 25.4.05 FROM THE 2ND RESPONDENT CONFIRMING THE CANCELLATION OF THE WORK ORDER

EXT.P5. COPY OF THE JUDGMENT DT. 5TH SEPTEMBER 2005 IN W.A. 1018/05 PASSED BY THIS HON'BLE COURT, FILED BY THE PETITIONER

EXT.P6. COPY OF THE ORDER DT. 7.12.05 NO.A2-1853/04/DEPOT/MIS. ISSUED BY THE 3RD RESPONDENT

EXT.P7. COPY OF THE REPLY DT. 15.12.05 NO.IJS/HED/272/2005 BY REGD. WITH A/D FROM THE PETITIONER TO THE 2ND RESPONDENT

EXT.P8. COPY OF THE NOTICE DT. 5.4.06 ISSUED BY THE 4TH RESPONDENT

EXT.P9. COPY OF THE DEMAND LETTER DT.6.4.06 FOR ATTACHMENT OF PROPERTY ISSUED BY THE 4TH RESPONDENT

RESPONDENT'S EXHIBITS:

EXT.R2(a). COPY OF APPLICATION DT. 20.12.04 FOR EXTENSION OF TIME OF COMPLETION OF THE WORK RECEIVED FROM THE PETITIONER

EXT.R2(b). COPY OF PETITIONER'S LETTER DT. 28.7.04

EXT.R2(c). COPY OF SUPPLEMENTAL AGREEMENT DT. 29.12.04

EXT.R2(d). COPY OF LETTER DT. 7.2.05 OF 2ND RESPONDENT

/TRUE COPY/

PA TO JUDGE.

V.GIRI, J.

W.P.(C). NO. 13490 OF 2006

Dated this the 19th day of October, 2007

J U D G M E N T

Petitioner had participated in a tender issued by the 2nd respondent in relation to the work of excavation in selected areas of Kallanchery Kayal at Kumbalangi Panchayat, Ernakulam District. His tender was accepted and Ext.P1 agreement was executed between the parties. As per the original time frame fixed under the agreement, work of excavation was to be completed within three months from the date of commencement of the agreement. Apparently, the petitioner was not able to do so. He sought for extension of time to complete the work and the same was granted under Ext.P2, in which it is mentioned that the period for completion of the work will stand extended up to 31.3.2005 without imposing penalty but subject to the other conditions in the original agreement. It seems that the petitioner was not able to complete the work within the extended period. It also seems that notice was issued to the petitioner on more than one occasion requiring him to complete the work. But the petitioner failed to complete the work. Alleging that the petitioner was not able to complete the work in spite of the extension and the petitioner had committed a breach of contract and that it would not be possible for him under any instance to complete the work within 31.3.2005, Ext.P1 contract was terminated by the

Superintendent Engineer at the risk and cost of the petitioner. This is as per Ext.P3 order. Petitioner sought for review of the order and the same was also rejected under Ext.P4.

2. Ext.P3 was challenged by the petitioner in W..P.(C) 14208/2005. The said writ petition was dismissed. Challenging the judgment of the learned single Judge, W.A. 1018/05 was filed by the petitioner. By a detailed judgment Ext.P5 dated 5.9.2005 the W.A was dismissed. Thereafter by Ext.P6 order dated 7.12.2005 the Executive Engineer intimated the petitioner that subsequent to the termination of his contract, the same was reassessed and awarded to one K.M. Jalal after forfeiting the security which had been deposited by the petitioner. The difference in the amount which the Government had to pay and the amount which the petitioner had contracted for, was treated as a liability of the petitioner and it was directed that the said amount will be recovered from the petitioner. Thereafter, Ext.P8 recovery notice was issued demanding an amount of Rs.8,19,562/- plus interest. Exts. P6, P8 and P9 have been challenged in this writ petition. Petitioner also seeks a direction restraining recovery of any amount from the petitioner on the basis of Ext.P6 without adjudication of the disputed questions of breach of contract and compensation by a court of law.

3. A counter affidavit has been filed by the respondents. It is contended that the petitioner was not able to complete the wok within the

time stipulated or within the extended time. On becoming aware of slackness on the part of the contractor, the 2nd respondent by Ext.R2(d) communication dated 7.2.2005 directed the petitioner to see that the work is completed under his own responsibility within the agreed time, namely 31.3.05. Petitioner did not show any progress thereafter. The required machineries and accessories were not brought to the site. Ultimately, the contract had to be terminated and the work had to be rearranged. This was done at the risk and cost of the petitioner and the same is permissible in terms of contract. The termination of the contract as per Ext.P3 was challenged before this Court but the challenge was repelled. The amounts sought to be recovered is the difference in the amount that the petitioner would have been paid and the amount which actually had to be paid by the subsequent contractor. The State is entitled to recover this amount. Provisions of the Revenue Recovery Act are intended only to facilitate the recovery. The respondents therefore prayed that the writ petition may be dismissed. There is no reply affidavit by the petitioner.

4. I heard learned counsel for the petitioner and the learned Government Pleader.

5. Learned counsel for the petitioner contends that the question as to whether there is a breach of contract on the part of the petitioner and if so, the quantum of the damages that could be realised by the Government from the petitioner are matters to be decided only by a competent civil court

on adjudication. It is further contended that the provisions of the Revenue Recovery Act may be invoked only for realisation of amounts due. The question as to whether any amount is due from the petitioner and if so its quantum are all matters which could be decided only by a competent civil court. He refers to the judgment of a Division Bench of this Court in **Sriram Engineering Construction Co. v. Kerala State Industrial Development Corporation** [2007 (1) KHC 974]. Learned Government Pleader contended that the question of breach and the validity of the termination does not arise in the present case as it stands confirmed by Ext.P5 judgment. What is sought to be realised from the petitioner is only the actual amount which the Government was compelled to shell out on account of failure on the part of the petitioner to complete the work in terms of the agreement.

6. The contract between the petitioner and the Government was terminated on account of the alleged breach on the part of petitioner in not completing the work within the stipulated time. Apparently, petitioner had commenced the work but was not able to show requisite progress therein. Ext.R2(d) notice was issued to him requiring him to commence the work and complete the same by 31.3.05. He was not able to do so and ultimately Ext.P3 order was passed by which the contract was terminated at the risk and cost of the petitioner. It is stated in Ext.P3 that the petitioner

will be responsible for any amount that the Government might be compelled to pay for being forced to rearrange the work. Ext.P3 evidences the termination of contract and the decision to rearrange the same at the risk and cost of the petitioner. The same was challenged in W.P.(C) No.14208/05. But this challenge was repelled. In Ext.P5 judgment the same was confirmed by the judgment of the learned Division Bench of this Court after considering in detail the contentions of the petitioner. Page 5 of the judgment is eloquent:

> *"We heard the counsel on either side. We have also gone through the averments contained in the writ petition as well as in the counter affidavit. In the facts and circumstances of the case we are not prepared to say that respondent has acted arbitrarily in terminating the work warranting interference by this court under Article 226 of the Constitution of India. Detailed counter affidavit has been filed in the writ appeal. It has been specifically stated in paragraph 5 of the counter affidavit that the Executive Engineer had issued a registered letter to the contractor on 24.1.2005 requesting to speed up the construction of the bund. The second respondent conducted site inspections on several occasions and instructed the appellant to start actual dredging works at least before 15.2.2005. A registered letter was also issued to the contractor on 7.2.2005 intimating that on the failure of the contractor to start the work by 15.2.2005 the work will be terminated and the work will be rearranged at his risk and cost. The Executive Engineer from the field had reported on 17.2.2005 that the contractor after completing about 50% of construction of the bund has stopped the work. On further enquiry it was learnt that the contractor had not started the actual dredging work nor resumed the construction of the temporary bund up to 7.3.2005. He had also failed to arrange dredger, pipelines and other equipments required for the work at the sit till 7.3.2005. It was under such circumstances the respondent has no other alternative, but to rearrange the work at his risk and cost. Consequently, the work was terminated*

as per Ext.P5 order dated 9.3.2005 and the same was retendered".

7. It is therefore clear that termination of the contract, though challenged in the earlier writ petition, was not interfered by this Court. In other words the validity of Ext.P3 is no longer open to question. Still further, it must be held that the termination of the contract though challenged was not interfered by this Court. Nor has the petitioner challenged Ext.P3 in the present writ petition.

8. The provision in Ext.P1 agreement by which on termination of a contract the Government is given facility to rearrange it at the risk and cost of the petitioner and recover the differential amount from the contractor is to be construed as a clause providing for liquidated damages. It is this clause which was invoked by the Government while terminating the contract at the risk and cost of the petitioner. Once the termination is challenged but not interfered by this Court, what remains is only the recovery of the amount which the Government says it was compelled to shell out on account of the breach of contract by the petitioner. It is this alone which was done under Ext.P6. The provisions under the Revenue Recovery Act have been invoked in relation to the amounts due to the Government and will thereby qualify itself as arrears of revenue due of land within the meaning of the Revenue Recovery Act. In such circumstances, I do not find any reasons to interfere with Exts. P6 and P9.

9. Learned counsel for the petitioner submits that essentially the amounts sought to be recovered by the Government will be in the nature of damages and damages can be said to be due only when there is an adjudication on the question of breach and on the quantum of damages. Reference in this regard is made to the aforementioned decision of the Division Bench in Sriram Engineering. The Division Bench was concerned in the said case with claims for damages made by the Kerala State Industrial Development Corporation. Apparently, there was a construction agreement entered into in that case for a water treatment plant between the Kerala State Industrial Development Corporation on one hand and the contractor on the other hand. The contract was cancelled at the risk and cost of the petitioner in that case and without settling the amount due, the Corporation went ahead and issued a notice seeking recovery of the amounts due to him by way of damages by recourse to the provisions of Revenue Recovery Act. The question as to whether there is a breach of contract and if so, what is the amount due to the contractor were not matters which were gone into by the Corporation. The Corporation decided that there is a breach and sought to recover the amount claimed by it as damages. This action was interfered by the Division Bench.

10. The decision aforesaid would have come to the rescue of the petitioner but for the fact that the termination of the contract under Ext.P3 was in fact challenged by the petitioner in W.P.(C) No.14208/05, but

without avail. Correctness of the termination was also challenged in the writ petition and also before the Division Bench. Para 5 of Ext.P5 judgment will show that the Division Bench had considered whether the respondents had acted arbitrarily in terminating the contract. But the answer to the question was in the negative. Essentially, what happened in the earlier round of litigation was that the petitioner had challenged the termination but the challenge was repelled by this Court. In other words Ext.P3 order was upheld. The consequence is that the termination order though challenged in court was not interfered with by the court. It may be noted in this context that it was always open to the petitioner at that point of time to have approached the civil court for seeking an appropriate declaration in relation to the validity of the termination of the contract or even in relation to that portion of Ext.P3 where it is stated that the rearrangement of the work will be at the risk and cost of the petitioner. Petitioner instead challenged the proceedings under Article 226 of the Constitution. The writ petition was dismissed and the judgment on merits was upheld by the Division Bench. Once Ext.P3 order of termination is upheld, it was open to the Government to recover the amount, which it was compelled to shell out, on being forced to rearrange the work. This was a case where though the breach as such was not admitted but a contention regarding illegal termination of contract though taken before the court was rejected by the court as such. Once Ext.P3 is upheld, then that part of Ext.P3 which enables the Government to

recover the difference between the amount which could have been paid to the petitioner and which it was actually compelled to pay could be recovered by the Government by way of liquidated damages which will have to be treated as a genuine pre estimate of damages. The case in question will therefore have to be treated as equivalent to a case where breach is not disputed or breach is admitted. If that be the case, there cannot be anything wrong either in Ext.P6 or Ext.P9. The decision of the Division Bench in Sriram therefore will not come to the rescue of the petitioner. Learned counsel refers to clause 18 of Ext.P1 itself, which reads thus:

> *"Unsettled disputes and difference if any regarding the work the undersigned and the contractor will not be referred to Arbitration and such disputes and differences and the claims arising out of them has to be got settled only in a civil court."(*page 33)

11. Learned counsel contends that the remedy of the Government was therefore to approach the civil court if it were of the opinion that there is breach of contract on the part of the petitioner.

In my view, this clause will hardly come to the rescue of the petitioner in circumstances where the Government is a party to the termination and the said termination was actually challenged by the petitioner before this Court. As noted above, no doubt it was open to the petitioner to have approached the civil court to seek an appropriate declaration in relation to the

termination of the contract. But once the petitioner had chosen to approach this Court challenging the order of termination and the same was upheld, it cannot be then said that there is still a dispute as to the termination of the contract or its validity which survives Ext.P5 judgment as such. Clause 18 of Ext.P1 has no application at this stage of the proceedings.

For all the reasons given above, I do not find any merit in the writ petition and the same is accordingly dismissed.

V.GIRI, JUDGE

vps